

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

ROBERT L. SWINTON, JR.,
Plaintiff,

v.

DECISION AND ORDER
15-CV- 53-A

CORRECTIONAL MEDICAL CARE, INC.,
DR. MAXIMILLIAN CHUNG, and
DR. CHARLES THOMAS,
Defendants.

This civil rights case was referred to Magistrate Judge Leslie G. Foschio, pursuant to 28 U.S.C. § 636(b)(1). On December 22, 2020, Magistrate Judge Foschio filed a Report and Recommendation (Dkt. No. 268), recommending that the motions pursuant to Fed. R. Civ. P. 56 for summary judgment filed by Defendants Correctional Medical Care, Inc., Dr. Maximillian Chung, and Dr. Charles Thomas, (Dkt. Nos. 252 and 259) be granted.

On January 6, 2021, *pro se* Plaintiff Robert L. Swinton, Jr. filed objections to the Report and Recommendation. Dkt. No. 269. Defendants Correctional Medical Care, Inc. and Dr. Charles Thomas filed a response on January 25, 2021 (Dkt. No. 273), and they filed supplemental briefing in support of their response on March 1, 2021 (Dkt. No. 278). Defendant Maximillian Chung file his response to plaintiff's objections on January 28, 2021 (Dkt. No. 277). Plaintiff's replies were filed on May 3, 2021. Dkt. No. 286. The matter was deemed submitted.

Pursuant to 28 U.S.C. §636(b)(1), the Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been raised. Upon *de novo* review, and after due consideration of the submissions from the parties and the record before the Court, the Court adopts the Magistrate Judge's recommended findings and conclusions, with one exception. While the Court adopts the recommendation to award summary judgment to defendants Correctional Medical Care, Inc., and Dr. Charles Thomason on the merits, the Court declines to adopt the portion of the recommendation based upon the affirmative defense of failure to exhaust administrative remedies pursuant to 42 U.S.C. § 1997e(a) that these Defendants did not allege in their Answers. The Court finds inadequate reasons for the Court to deem the Answers amended to raise this defense for the first time by the motion for summary judgment. See *e.g.*, *Bonilla v. Janovick*, No. 01-CV-3988 SJF ETB, 2005 WL 61505, at *1–2 (E.D.N.Y. Jan. 7, 2005). It is nevertheless therefore

ORDERED pursuant to 28 U.S.C. § 636(b)(1), and for the reasons set forth in the Report and Recommendation (Dkt. No. 268), that Defendants' motions for summary judgment pursuant to Fed. R. Civ. P. 56 (Dkt. Nos. 252 and 259) are granted and judgment entered in favor of Defendants Correctional Medical Care, Inc., Dr. Maximillian Chung, and Dr. Charles Thomas. The Clerk of Court shall take all steps necessary to close the case.

IT IS SO ORDERED.

s/Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT COURT

Dated: May 18, 2021